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No. 89-70

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

CARTER T.G. KUEHN,

Petitioner,

v.

COUNCIL NO. 65, AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, *et alia*,

Respondents.

On petition for a writ of certiorari to the Court of Appeals of Minnesota

PETITIONER'S REPLY TO BRIEF IN OPPOSITION OF RESPONDENT MINNESOTA PUBLIC EMPLOYMENT RELATIONS BOARD

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INTRODUCTION

Petitioner Carter T.G. Kuehn hereby replies to the brief in opposition of respondent Minnesota Public Employment Relations Board (PERB).

ARGUMENT

PERB's arguments highlight the need for this Court to grant the petition.

1. PERB first offers the truly stupefying interpretation that *Hudson's* requirement that a "fair-share-fee" notice contain "verification by an independent auditor"[1] is merely "dicta".[2] In fact, *Hudson* "h[e]ld * * * that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee".[3] It held that what the union there had done "was not an adequate disclosure", and stated that "adequate disclosure surely would include * * * verification by an independent auditor".[4] So, for PERB to characterize *Hudson's* "verification"-requirement as "dicta" is disingenuous. Of course the motive for PERB's pretense is its knowledge that Minnesota does not enforce a "verification"-requirement in its "fair-share" scheme—and that, therefore, the scheme is unanswerably unconstitutional under *Hudson*.

2. PERB says that the "financial statements" of Council 65 and AFSCME were audited, and suggests that that should be enough.[5] *Hudson*, however, requires that the breakdown of a union's expenditures into the categories "collective bargaining" (CB) and "noncollective bargaining" (NCB) be audited. Nonunion employees are not interested, after all, in being assured that a union spent $X on "salaries", for example. Rather, they want to know how much of X went to "salaries" paid to employees who performed specific CB activities. And the over-

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[1]475 U.S. at 307 n.18.

[2]Brief in Opposition at 5, 6.

[3]475 U.S. at 310.

[4]*Id.* at 307 & n.18.

[5]Brief in Opposition at 5-6. PERB admits, though, that the Local's "financial data" were unaudited altogether.

whelming weight of authority in the lower courts so recognizes.[6]

PERB pretends that *Andrews* is contra.[7] *Andrews*, however, dealt not with "verification" of CB versus NCB costs, but with whether the independent auditor was required to make the legal determinations of what activities were CB or NCB.[8] That issue is not here for review.

3. PERB then says that *Hudson's* "qualified" terminology of "sufficient information" and "adequate disclosure" implies something approaching a de minimis level.[9] Logic dictates otherwise: "Sufficiency" and "adequacy" import a quantity and quality meeting rational standards—not just some, of any kind; but enough of a certain kind.

4. PERB complains that a union should not have to "identify and define with particularity the specific * * * activities that constitute the categorized expenditures listed in its financial statements".[10] Why not? Without the union's expenditures being arranged by categories of activities described functionally in a manner that relates

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[6]*E.g.*, Tierney v. City of Toledo, 824 F.2d 1497, 1503-04, 1506 (6th Cir. 1987); Ellis v. Western Airlines, Inc., 652 F. Supp. 938, 941 (S.D. Cal. 1986); Gilpin v. AFSCME, 643 F. Supp. 733, 737 (C.D. Ill. 1986); Lehnert v. Ferris Faculty Ass'n-MEA-NEA, 643 F. Supp. 1306, 1332 (W.D. Mich. 1986); McGlumphy v. Fraternal Order of Police, 633 F. Supp. 1074, 1082 (N.D. Ohio 1986).

[7]Brief in Opposition at 6, citing Andrews v. Education Ass'n of Cheshire, 829 F.2d 335 (2d Cir. 1987).

[8]829 F.2d at 340, so construed in Ping v. NEA, 870 F.2d 1369, 1374 (7th Cir. 1989).

[9]Brief in Opposition at 6-7.

[10]*Id.* at 7.

them intelligibly to CB, how can nonunion employees "gauge the propriety of the union's fee"?[11]

In effect, by merely listing line-item entries from their normal institutional budgets with appended percentages that they claim represent CB or NCB costs, the unions have resuscitated in a new body the so-called "residuum theory" that *Hudson* summarily executed.[12] The *Hudson* unions took their complete line-item budgets, identified certain supposedly NCB activities, estimated the costs of those activities, and presented this total cost as a percentage of their budgets.[13] Here, Council 65 and its affiliates have done the same thing, operationally, for each line-item individually. And the overall result is the same, too: "An acknowledgment that [Kuehn] would not be required to pay any part of", for example, $3,411 out of $9,222 for Council 65's otherwise undefined and unexplained "legislative expense", "[is] not an adequate disclosure of the reasons why [he was] required to pay [his]

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[11]Hudson, 475 U.S. at 306. For instance, what of significance does Kuehn learn from Council 65's disclosure that it expended $392,645 for "salaries", and considers that expenditure 100% chargeable as CB? Appendix to Petition at 50a. Does Kuehn know what was done, by whom, when, where, why, or for whose benefit? Similarly, what does the Local disclose when it claims that $9,336.21 (nearly 100%) of its expenses were devoted to "union administration"? *Id.* at 52a.

[12]475 U.S. at 306-07.

[13]*Id.* at 295.

share of" the $5,811 charged.[14]

5. Finally, PERB pretends that "[t]he BMS specifically found that the organizational bodies to which per capita taxes were paid provided services to * * * Council 65 by aiding in its collective bargaining and contract administration responsibilities".[15] The record, however, contains no such evidence. The supposed "finding" of the BMS is, in actuality, merely the application of its "integration" theory, which illegally substitutes a general conclusive presumption for specific facts.

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[14]*Id.* at 307 (footnote omitted). The example is taken from Appendix to Petition at 50a.

If it were sufficient simply to say that, for example, $5,231,228 out of $5,247,796 of AFSCME International's "field services" line-item is chargeable to Kuehn, then why would it not be sufficient to say that $16,568 is not chargeable? Of course, the two statements amount to the same thing. Yet, if so, why is not the line-item presentation the unions used simply the "residuum theory" in a new guise: *i.e.*, a "residuum" is presented for each line-item, instead of for the line-items taken as a whole. But, then, various "residua" are summed, adding up to the same result as if a collective "residuum" had been calculated in the first place. All that nonunion employees such as Kuehn receive from this "massaging" of the data is a series of "*Hudson* 5%s"—that is, a series of admissions of what the unions have not spent on CB, without statements of "the reasons why" what they claim to have spent on CB is legitimate.

[15]Brief in Opposition at 8, citing Appendix to Petition at 36a.

CONCLUSION

For the foregoing reasons, this Court should reject PERB's opposition, and grant the writ.

Respectfully submited,

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